[Cite as *State v. Sheron*, 2010-Ohio-5129.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94007

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DWAYNE SHERON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-519270

BEFORE: Dyke, J., Kilbane, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: October 21, 2010

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ANN DYKE, J.:

{¶ 1} Defendant-appellant, Dwayne Sheron ("appellant"), appeals his convictions for one count of drug possession, two counts of drug trafficking, and one count of possessing criminal tools. For the reasons provided below, we affirm his convictions in part and reverse in part and remand the matter for resentencing.

{¶ 2} On January 2, 2009, the Cuyahoga County Grand Jury indicted appellant on four counts: Count 1 alleged drug possession of crack cocaine in violation of R.C. 2925.11(A); Count 2 alleged drug trafficking in crack cocaine, in violation of R.C. 2925.03(A)(1); Count 3 alleged drug trafficking in crack cocaine in violation of R.C. 2925.03(A)(2); Count 4 alleged possessing criminal tools, in violation of R.C. 2923.24(A). All four counts included two forfeiture specifications

and the two drug trafficking charges also included a schoolyard specification. Appellant pled not guilty to the charges and the case proceeded to a jury trial on July 6, 2009.

{¶ 3} At trial, the state presented four individuals for examination: Detective John Pitts, Detective Michael Duller, Sergeant Thomas Rauscher, and Detective Maria Matos. Their testimony established the following facts.

{¶ 4} On December 17, 2008, a confidential reliable informant ("CRI") telephoned Detective Matos and informed her that the CRI could purchase drugs from appellant. As a result, Matos agreed to meet the CRI at the parking lot of St. Ignatius of Antioch Elementary School located on West Boulevard and Lorain Avenue in Cleveland, Ohio.

{¶ 5} Immediately upon arrival, Matos performed a strip search of the CRI, looking inside her bra, panties, pockets, socks, shoes, purse, and vehicle to assure there were no drugs, money, or other paraphernalia. Then the CRI telephoned appellant's cell phone and set up a drug buy at the BP gas station across the street from the school. Thereafter, Matos supplied the CRI with two $20 bills of Cleveland Police Department ("CPD") buy money. She explained that prior to meeting with the CRI, she photocopied the money and recorded the serial numbers. Also, she marked two black dots on each bill in the lower right hand corner.

{¶ 6} Immediately, Detectives Matos, Pitts, and Duller and other police officers set up surveillance around the gas station. Soon thereafter, they all

watched as appellant drove his blue Ford Contour into the parking lot and pulled behind an undercover Det. Matos. She explained that appellant was in the driver's seat, and Gregory Johnson-Peek, the co-defendant, was in the front passenger's seat. Det. Matos then watched in the rearview mirror as her CRI entered the back of appellant's vehicle behind the driver's seat. She then saw appellant reach back, and subsequently, the CRI reach forward. Det. Pitts testified that he too saw this action. Then the CRI exited the vehicle and began playing with her hair — the prearranged signal that the buy had occurred. Upon that, Det. Matos gave the instruction to perform the takedown of the vehicle.

{¶ 7} Det. Duller testified that once he got the signal from Det. Matos, he stopped appellant's vehicle and arrested him. Det. Putnam and Sgt. Rauscher arrested the passenger, Gregory Johnson-Peek. The detectives found the cell phone with the same number the CRI telephoned to set-up the drug buy upon appellant. Det. Duller also testified that he discovered the two $20 bills of CPD buy money in appellant's pocket along with an additional $143. Sgt. Kelly and Det. Duller also discovered a baggie of marijuana in the driver's door armrest.

{¶ 8} While the other detectives were taking down appellant's vehicle, Det. Matos followed the CRI as she entered her vehicle at the BP station and drove to the St. Ignatius parking lot. Immediately upon arrival, the CRI provided Det. Matos with a small baggie of crack cocaine. The drugs tested positive for crack cocaine and weighed .32 grams. Det. Matos then performed another strip

search of the CRI and her vehicle. Det. Matos did not find any suspicious property.

{¶ 9} Upon completion of the state's case-in-chief, appellant moved for acquittal and the trial court granted his request as to the schoolyard specifications in Counts 2 and 3. On July 9, 2009, the jury found appellant guilty on all four counts as charged in the indictment. Because appellant previously waived his right to a jury trial on the forfeiture specifications, on July 13, 2009, the court continued to a bifurcated bench trial regarding these specifications. After hearing the relevant evidence, the trial court found appellant guilty of all forfeiture specifications regarding the Samsung cell phone but granted appellant's motion for acquittal as to all forfeiture specifications concerning the $143.

{¶ 10} On September 10, 2009, the trial court sentenced appellant to one year imprisonment for each of the four counts and ordered said sentences to be served concurrently. The trial court also ordered that sentence to be served concurrently to his sentences in two other cases: Case Nos. CR-519292 and 523961. Finally, the court imposed three years of postrelease control.

{¶ 11} Appellant now appeals and presents the following assignments of error for our review. His first error provides:

{¶ 12} "Appellant was deprived of effective assistance of counsel, thereby being deprived of a fair trial."

{¶ 13} Here, appellant argues that his counsel was ineffective for failing to recognize and cross-examine Det. Matos and Det. Pitts regarding a few minor

inconsistencies. Det. Pitts testified that he caused the phone call between appellant and the CRI while Det. Matos testified that she had the CRI make the phone call. Additionally, appellant maintains that Det. Pitts's testimony that he heard the male's voice on the other end of the phone as he stood outside the vehicle contradicts Det. Matos's testimony that no other officers could hear appellant speaking on the other end of the phone with the CRI. We find appellant's argument unpersuasive.

{¶ 14} In order to establish a claim of ineffective assistance of trial counsel, the applicant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, cert. denied (1990), 497 U.S. 1011, 110 S.Ct. 3258, 111 L.Ed.2d 768.

{¶ 15} In *Strickland*, the United States Supreme Court ruled that judicial scrutiny of an attorney's work must be highly deferential. The Court noted that it is much too alluring for a defendant to second-guess his lawyer after conviction and that it would be all too simple for a court, examining an unsuccessful defense in hindsight, to conclude that a particular act or omission was deficient. Therefore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466

U.S. 689.

{¶ 16} With regard to defense counsel's decision not to cross-examine Det. Pitts or Det. Matos, we find these inconsistencies very minor. Who initiated the phone conversation or who actually overhead the recipient's voice is irrelevant to the charges at hand. Furthermore, defense counsel's decision not to cross-examine the witnesses regarding these discrepancies constitutes a trial tactic that we will not second-guess. The record demonstrates that counsel, during cross-examinations, concentrated on the arguments that the co-defendant, Gregory Johnson-Peek, was the one selling the drugs, that no detectives actually saw the buy money or the drugs in appellant's hands during the alleged exchange, that the confidential informant was not reliable and actually hid drugs upon her person, and that the state did not legally establish that the drug buy occurred within 1,000 feet of a school. In a trial, the goal is to provide effective advocacy. Thus, it is advantageous for an advocate to concentrate on the stronger arguments because including the weaker arguments might lessen the impact of the stronger ones. See *Jones v. Barnes* (1983), 463 U.S. 745, 751-753, 103 S.Ct. 3308, 77 L.Ed.2d 987; *State v. Jackson*, Cuyahoga App. No. 91613, 2010-Ohio-1742.

{¶ 17} Moreover, appellant is unable to establish prejudice — that the outcome of the trial would not have been different had counsel cross-examined the detectives regarding who heard the telephone call. The rest of the undisputed testimony and evidence established that after the CRI called

appellant's cell phone, she went to the BP gas station, entered appellant's vehicle with two marked $20 bills of CPD buy money, sat behind him, some exchange occurred between the two and the CRI exited the vehicle with a small baggie of crack cocaine. Additionally, appellant was found with the CPD buy money. In light of the foregoing, we overrule appellant's first assignment of error.

{¶ 18} His second assignment of error states:

{¶ 19} "The conviction was against the manifest weight of the evidence."

{¶ 20} "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other.'" *State v. Thompkins*, 78 Ohio St.3d 380, 388, 1997-Ohio-52, 678 N.E.2d 541, quoting Black's Law Dictionary (6 Ed. 1990), at 1594. When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶ 21} In evaluating a challenge to the verdict based on the manifest weight of the evidence, this court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Thompkins*, supra.

{¶ 22} Here, appellant argues that a manifest injustice occurred because the CRI did not testify at trial, and although Det. Pitts and Det. Matos testified that they saw an exchange between appellant and the CRI, they could not affirmatively state that they saw buy money or drugs being exchanged. We find appellant's argument without merit.

{¶ 23} Proof of guilt may be established by real evidence, circumstantial evidence, and direct or testimonial evidence, or any combination of the three, and all three have equal probative value. *State v. Nicely* (1988), 39 Ohio St.3d 147, 151, 529 N.E.2d 1236. In this case, the state presented more than adequate circumstantial evidence that an exchange of buy money and drugs occurred between the CRI and appellant. Det. Matos testified that after conducting a complete search of the CRI and her belongings, Det. Matos provided her with CPD buy money that had a black dot and the serial numbers recorded. Then Detectives Matos and Pitts watched as the CRI entered appellant's vehicle, sat in the back seat behind him, engaged in some type of exchange with him, and then exited the vehicle. Det. Duller testified that the arrest and search of appellant following this exchange revealed the CPD buy money that was identified both by the black dot and the serial number. Additionally, Det. Matos provided that the CRI informant returned from the buy with a baggie of .34 grams of crack cocaine.

In light of the foregoing, even without evidence that the detectives specifically saw drugs or money being exchanged, we find the conviction is not against the manifest weight of the evidence.

{¶ 24} While we have affirmed appellant's convictions, we nevertheless sua sponte reverse and remand for resentencing because the trial court failed to merge appellant's conviction for drug possession with his conviction for drug trafficking in violation of R.C. 2925.03(A)(2).

{¶ 25} R.C. 2941.25(A) states that "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant can be convicted of only one."

{¶ 26} The Ohio Supreme Court has held that "[t]rafficking in a controlled substance under R.C. 2925.03(A)(2) and possession of that same controlled substance under R.C. 2925.11(A) are allied offenses of similar import." *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, paragraph two of the syllabus. Accordingly, because we find that the drug trafficking in crack cocaine charge and drug possession charge for that same substance were committed at the same time and with the same animus, we find the trial court erred in failing to merge them.

{¶ 27} Even though the trial court sentenced appellant to concurrent terms for each conviction, "a defendant is prejudiced by having more convictions than are authorized by law." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶31. Accordingly, we remand this case to the trial court for resentencing where the state must elect on which charges the court should convict and sentence appellant. *State v. Williams*, 124 Ohio St.3d 381,

2010-Ohio-147, 922 N.E.2d 937, paragraph three of the syllabus.

{¶ 28} Convictions reversed in part and case remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case reversed in part and remanded to the trial court.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, JUDGE

MARY EILEEN KILBANE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR